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577-505——75——1

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1170

THOMAS MARTIN AUSTIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 511 F. 2d 622. The September 30, 1974, opinion of the district court (Pet. App. C), is reported at 382 F. Supp. 1111. The district court's memoranda and orders of September 10, 1974, and November 21, 1974 (Pet. Apps. B and D) are not reported. The November 26, 1974, memorandum and order of the district court (Pet. App. E) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1975 (Pet. App. F). The petition for

a writ of certiorari was filed on March 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court exceeded its authority by appointing counsel to represent several fugitive defendants and by entertaining motions made ostensibly on their behalf by appointed counsel, when all such proceedings were conducted without the knowledge, consent, or participation of the defendants.

STATEMENT

1. The procedural history of this case is set forth in the opinion of the court of appeals (Pet. App. A 1–7). On September 10, 1974, the United States District Court for the Eastern District of New York Judge Weinstein entered an order *sua sponte* declaring that the defendants in 26 Selective Service criminal cases pending before it were allegedly fugitives without representation.[1] Taking judicial notice that

[1] For the purposes of the present petition only 19 cases are involved. One case has been terminated by reason of the defendant's death (*United States* v. *Lockwood*, Cr. 43456). The government has moved to dismiss two others, one because of the inadvertent destruction of the defendant's Selective Service file (*United States* v. *Wilson*, 69 Cr. 155), and the other because the defendant's induction order had been improperly accelerated on account of his failure to complete and return a form claiming conscientious objector classification (*United States* v. *Dewey*, 66 Cr. 456). In a fourth case (*United States* v. *Estremera*, 72 Cr. 1291), the defendant, upon being extradited to the United States on other charges, retained Jesse Berman, Esq., to represent him in lieu of the district court's initial appointment of Louis Lusky, Esq., and the government agreed to turn over his Selective Service file to Mr. Berman for review. After the opinion below was rendered, indictments

the President and Congress were then considering some form of amnesty for fugitives in such cases and concluding that the rights of these defendants might therefore be affected, the court, without prior notice to the government or the defendants, appointed Professor Louis Lusky of the Columbia University School of Law to represent these defendants (Pet. App. B).[2]

Upon learning of the order, the government advised the court on September 13, that, if the fugitive defendants should return to the United States, it would acquiesce in a delay of trial to permit disposition in accordance with any promulgations respecting amnesty and would agree to the release on personal recognizance of those defendants charged solely with Selective Service violations, but it also stated that it believed that the court had no authority to enter the order appointing Mr. Lusky. Upon the United States Attorney's motion to vacate the September 10 appointment of counsel, the court stayed the order pending a hearing on September 20.[3] Following that

against three other defendants (Alan Stephen Dorn, 69 Cr. 57; Thomas John Collura, 72 Cr. 1028; Arthur Marc Campus, 69 Cr. 182), were dismissed at the government's behest, because the Department inadvertently omitted their names from a compilation of those eligible for the President's clemency program submitted to Senator Edward Kennedy, Chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedure.

[2] That same day, September 10, 1974, the court issued a written memorandum and order to the same effect (Pet. App. B.).

[3] On September 16, the President's Amnesty Proclamation was issued.

hearing, the court filed a memorandum decision and order upholding its earlier *ex parte* order. On September 30, the court revised its opinion, stated at greater length its reasons for the appointment of counsel notwithstanding the defendants' absence from the jurisdiction as fugitives and their failure to authorize any such action to be undertaken on their behalf;[4] it again denied the government's motion to set aside its September 10 order (Pet. App. C; 382 F. Supp. 1111).

2. Thereafter, the court entertained motions made on behalf of the fugitive defendants by Mr. Lusky. Lusky moved to dismiss the indictments on the ground that the defendants had been denied a speedy trial in violation of their Sixth Amendment rights, even though trials had been rendered impossible by the defendants' flight from the jurisdiction. The government, in response to the motions, submitted affidavits attesting to the fugitive status of 23 of the defendants and the government's good faith efforts to locate and arrest them. Oral argument was heard on November 1, 1974. While apparently unable to find the indictments defective on their face, the court accepted

[4] The court stated that fugitive cases were artificially inflating the case load of both the court and the prosecutor and that, in order to guarantee "prompt disposition" of these cases, it would call each case to determine whether the government was making reasonable efforts to apprehend the fugitives, whether the public or the defendants were being prejudiced by the delay, and whether the indictments should be dismissed. It further stated that the President's Amnesty Proclamation might present an unfair choice to guiltless defendants, since they might accept the amnesty program rather than face trial (Pet. App. C2).

the suggestion of an *amicus curiae*, Michael Tigar, Esq., that Mr. Lusky be permitted to inspect the defendants' Selective Service files to determine whether motions might lie to dismiss the indictments on the basis of information appearing in the files. The informal order was stayed pending the filing of a brief by the government.[5]

On November 21, 1974, after having received and considered the government's brief, the court vacated the stay and ordered that the files be turned over to it so that it might makes copies available to Messrs. Lusky and Tigar (Pet. App. D). The government, while refusing to turn over the files for inspection by Messrs Lusky and Tigar, advised the court that it was willing to provide a copy of each defendant's file to the defendant or his authorized representative.[6] On November 26, 1974, the court issued a memorandum and order denying Mr. Lusky's earlier motions for dismissal of the indictments for lack of a speedy trial. However, the denial was without prejudice to a renewal of the motion after Mr. Lusky had examined the Selective Service files of the defendants (Pet. App. E).

The government then stated its intention to seek appellate review, and the court granted the government's request for a 14-day stay pending its filing

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[5] The government's brief again challenged the power of the district court so to proceed and further argued that only "a defendant" may obtain discovery of confidential documents pursuant to Rule 16(b) of the Fed. R. Crim. P.

[6] The government has supplied Messrs. Lusky and Tigar with the last known addresses of each of the defendants.

of a petition for a writ of mandamus and prohibition in the Second Circuit Court of Appeals seeking to vacate the orders entered by the court on November 1, 21, and 26, 1974.

3. On January 30, 1975, the court of appeals granted a writ of mandamus (Pet. App. A) and entered its judgment (Pet. App. F) requiring the district judge (1) to vacate his orders opening the Selective Service files of each of the fugitive defendants for inspection by Messrs. Lusky and Tigar without prior authority from the defedant whose file is sought, and (2) to cease entertaining motions on behalf of any of the fugtive defendants raising non-jurisdictional defenses to the indictments against such defendants, at least when no such defendant has authorized such action on his behalf.

ARGUMENT

1. At the outset we note that there is a substantial question whether Mr. Lusky has authority to file a petition on behalf of the named petitioners. Although Mr. Lusky may be an interested bystander, he has not been retained to file a petition by either Judge Weinstein[*] or the petitioners, nor does he have any

[*] Under Rule 21(b), Fed. R. App. P., which governs mandamus proceedings, if the judge named in the petition declines to appear, the petition is not taken as admitted because the Rule provides that "[a]ll parties below other than the petitioner shall also be deemed respondents for all purposes." Judge Weinstein did not appear in the court of appeals proceedings (Pet. 9), and although the court of appeals did not question Mr. Lusky's standing to speak on behalf of the judge in the mandamus action, it in effect concluded that there were

personal interest in the relief sought in the petition.[8]

In addition, entirely apart from the status of Mr. Lusky as, in effect, a stranger to any controversy

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no parties in the district court proceedings for whom Mr. Lusky was authorized to act. While procedural necessity may have dictated that Mr. Lusky's standing be assumed and an adversarial setting thereby preserved with respect to the *government's* petition for a writ of prohibition and mandamus, no such necessity exists regarding the invocation "on behalf" of *petitioners* of this Court's discretionary jurisdiction.

[8] The posture of this case is similar to that of *Rosenberg* v. *United States*, 346 U.S. 273, 291–292. In *Rosenberg*, the defendants were tried, convicted, and sentenced to death for conspiring to commit espionage in wartime, in violation of the Espionage Act of 1917, 50 U.S.C. 32(a), 34. After the adjournment of the 1952 Term and one Special Term, counsel representing one Edelman, who described himself as "next friend" to the Rosenbergs, presented to Mr. Justice Douglas a petition for habeas corpus which included a prayer for a stay. More than two months before this, Edelman's attorneys had asked counsel for the Rosenbergs to raise the very issue then presented to Mr. Justice Douglas. The argument was not adopted at that time by counsel for the defendants. Because Mr. Justice Douglas was of the opinion that Edelman's counsel posed a substantial question, he granted a stay of execution pending determination of the issue raised. In vacating the stay on grounds that the question was not substantial, this Court expressly disapproved the "irregular manner" in which the new contention was presented. *Id.* at 291. This Court, further noting that Edelman was a stranger to the Rosenbergs and to their case and that his intervention was unauthorized by them and originally opposed by their counsel, held that the precedent in the case of granting an unauthorized stranger standing to raise the question presented "a threat to orderly and responsible representation of accused persons and the right of themselves and their counsel to control their own cases." *Id.* at 291–292. This Court then concluded: "That such disorderly intervention is more likely to prejudice than to help the representation of accused persons in highly publicized cases is self-evident. We discountenance this practice." *Id.* at 292. The in-

between the defendants and the government, the defendants (in whose name the petition was filed) are fugitives who are not entitled "to call upon the resources of the Court for determination of [their] claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366. See *Bonahan* v. *Nebraska*, 125 U.S. 692; *Smith* v. *United States*, 94 U.S. 97.

2. Even assuming that petitioners have properly invoked this Court's jurisdiction, the court of appeals, in an opinion on which we principally rely, correctly granted a writ of mandamus vacating the district court's orders.

The court of appeals considered all of the possible sources of judicial power upon which the district court might have predicated its orders and found no basis for the court's *sua sponte* appointment of counsel for fugitive defendants.* Thus, the court concluded (Pet. App. A 10–11):

> The absence of any statutory or inherent authority for district court action of the type

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tervention of unauthorized counsel in this case closely parallels that of the *Rosenberg* case; thus, to accord unauthorized counsel standing to litigate under the circumstances present here would appear to be at odds with this Court's express disapproval of such a procedure.

* Noting the district court's reliance on decisions upholding a court's power under Rule 12(b)(2), Fed. R. Crim. P., to dismiss an indictment appearing insufficient on its face and to dispense with the defendant's presence in hearing pretrial motions, the court of appeals observed (Pet. App. A 5–6) that such authorities did not support "the proposition that a trial court might, without a defendant's presence or consent, make an evidentiary disposition of a criminal case upon motion of an attorney acting without the defendant's knowledge or consent."

taken by respondent is not surprising. The challenged orders violate a fundamental premise underlying our method of administering justice. Ours is essentially an adversarial, not an inquisitorial, system. Whatever may be the judge's role in countries governed by a system of Civil Law, where the judge may by custom engage in investigative or prosecutorial activities, we have chosen to administer justice through courts which are limited to the adjudication of cases and controversies in an adversarial setting. See Art. III, U.S. Constitution; *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). With rare exceptions a federal court is not authorized to act *sua sponte;* an adversarial interest is essential. *Jenkins* v. *McKeithen*, 395 U.S. 411, 423 (1969). Although district judges possess the power to issue writs "in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C. § 1651, no usage or custom exists that permits a judge to appoint himself or a stranger as the representative of a defendant who has fled the jurisdiction in order to avoid facing criminal charges, at least without the fugitive's authority or consent. Indeed, controlling precedent is to the contrary. The flight of a defendant for the purpose of avoiding prosecution or punishment "disentitles [him] to call upon the resources of the Court for determination of his claims," *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970); see *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *United States* v. *Sperling*, — F. 2d — (2d Cir. Oct. 10, 1974), Slip Opin. 5637,

5673 n. 33; *Dawkins* v. *Mitchell*, 437 F. 2d 646 (D.C. Cir. 1970); *People* v. *Genet*, 59 N.Y. 80 (1874).

3. Having properly ruled that the district court had no power to appoint counsel for the fugitive defendants, the court of appeals also correctly vacated the district court order granting Mr. Lusky and the *amicus* access to the defendants' Selective Service files. The court noted (Pet. App. A 9) that such files "are confidential in nature" (32 C.F.R. 1608.21) and therefore "should not be disclosed to persons other than the government officials concerned or to the defendant or his authorized representative." [10]

4. Since the district court exceeded its powers in appointing counsel for fugitive defendants and in entertaining motions made on their behalf, the court of appeals properly granted a writ of mandamus vacating those orders. See *United States* v. *Smith*, 331 U.S. 469; *Ex parte United States*, 242 U.S. 27; *United States* v. *Lasker*, 481 F. 2d 229 (C.A. 2), certiorari denied, 415 U.S. 975.

[10] Mr. Lusky's petition suggests that the question of access to these files is now moot by virtue of the 1974 amendments to the investigatory files exemption of the Freedom of Information Act. There is no occasion for this Court to consider that question, but we note that the rights of Mr. Lusky and the *amicus*, as members of the general public, to inspect the files do not rest solely on the investigatory files exemption. Rather, a request for inspection would also implicate exemption 6 of the Act, relating to an unwarranted invasion of personal privacy, 5 U.S.C. 552(b)(6), and the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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